

2012

Ozzie & Harriet are Perfect Candidates to Adopt, But Ozzie & Harry are Barred: Boseman v. Jarrell & The Effects of Prohibition on Second Parent Adoptions

Amanda von Schmid
Seton Hall Law

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship



Part of the [Family Law Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

von Schmid, Amanda, "Ozzie & Harriet are Perfect Candidates to Adopt, But Ozzie & Harry are Barred: Boseman v. Jarrell & The Effects of Prohibition on Second Parent Adoptions" (2012). *Law School Student Scholarship*. 85.
https://scholarship.shu.edu/student_scholarship/85

**Ozzie & Harriet are Perfect Candidates to Adopt, But Ozzie & Harry are Barred:
Boseman v. Jarrell & The Effects of Prohibition on Second Parent Adoptions**

Amanda von Schmid

Introduction

The goal of this paper is to identify and confront the major policy issues surrounding second parent adoptions and their availability, or lack thereof, to same-sex couples. This will be accomplished primarily through an analysis of a 2010 North Carolina Supreme Court case, *Boseman v. Jarrell*.¹ This paper will begin with a hypothetical fact scenario for the reader's consideration, which will aid in highlighting some of the problematic areas of the North Carolina court's decision. Following this hypothetical scenario, the reader will be introduced to additional sections of the paper which will provide the facts of the North Carolina case itself, as well as a background and analysis of a number of relevant issues. Before getting more specific, consider the following hypothetical facts.

Imagine a man and a woman meet and fall in love. They begin to date and after a few years, they move in together and decide that it is their mutual goal to have and raise children together. Unfortunately for the couple, they find themselves unable to conceive naturally. Now imagine the couple so passionately wanted to become parents, that as an alternative, they seek help from a third party. The woman becomes pregnant through an anonymous sperm donor. Her boyfriend, although not the biological father of the unborn child, cares for his pregnant girlfriend throughout the entirety of her pregnancy, doing everything he possibly can to protect and help both her and the baby. The woman gives birth to a son with her boyfriend at her hospital bedside.

¹ *Boseman v. Jarrell*, 704 S.E.2d 494 (2010) (a recent North Carolina Supreme Court opinion which prohibited second parent adoption in the state entirely).

The couple share equal parenting responsibilities, both parties contribute to the fiscal well-being of their son, and the families of both the man and the woman are involved in the boy's life. As he grows older, the child knows and loves the woman as his mother, and the man as his father, calling them "Mommy" and "Daddy," respectively. Both the man and the woman hold themselves out as parents to society, and make collaborative decisions with regard to every important aspect of the child's life.

Over time, the couple realizes the legal benefits the child would experience if he had two legal parents rather than just one, such as life insurance from both parents, for instance. Deciding that it is best for his family to legally become a part of his son's life, the man petitions for adoption of the child. The court informs the couple that in order for the child's biological mother to maintain her rights after the adoption, the couple must be married. Absent a certificate of marriage, the man could not successfully adopt the child without legally severing the parental rights of the child's biological mother, the man's girlfriend, as a consequence. Because of their shared interest in venturing into the world of legal parenthood together as a couple, the two decide to marry in order to achieve joint legal parenthood. Subsequently, they head back to court and obtain an adoption. Sadly, the couple's relationship eventually deteriorates, and they split up. Filled with bitterness toward her ex, the woman petitions to the court for full custody of the child and termination of the man's parental rights upon divorce. The court, noting that the man is not the biological father of the child, severs his parental rights and finds for the woman. In doing so, the court leaves the minor child with only one legal parent and no recognizable relationship with the man who has provided for him, and whom he has known for the entirety of his life as "Daddy."

Although the above outcome is unlikely absent a substantial showing of the man's parental unfitness, this outcome as it is written above is extraordinarily unfair to the parties involved for a number of reasons. First and most importantly, the outcome is unfair to the minor child, who is too young to voice his own thoughts and desires with regard to his family and parents. With the court's decision, the child's legal relationship with the man he knows to be his father is nullified. This simultaneously eliminates any future health or life insurance benefits the boy may be eligible to receive, and any responsibility upon the man to continue to provide support (financial, emotional or otherwise) to the boy. Secondly, the outcome is unfair to the man himself, who even prior to the conception of the child had his heart set on fatherhood. For years, this man had provided and cared for the child as a father would, presented himself to society as the child's parent and, collaboratively with the child's mother, embarked upon an official adoption of the child to ensure both his and the child's legal rights. He even married in order to achieve this goal. I presume that upon imagining the above factual scenario, a majority of readers are able to see that the outcome is problematic and termination of this man's legal relationship with this child is in opposition to public policy for the aforementioned reasons affecting both himself and the child.

Now, imagine this exact scenario with just two factual differences. First, the man and the woman in the prior scenario become two women in a long-term, cohabiting relationship. Second, they are unmarried, as the law requires them to be by forbidding recognition of same-sex marriages in the state. By incorporating these two factual differences, we have created the basic facts of the 2010 North Carolina Supreme Court case *Boseman v. Jarrell*. The case surrounds the

issue of “second parent adoption,”² which will be thoroughly explained in a later section of this paper. The court reached its conclusion, which severed the relationship between a minor child and a woman who behaved as the child’s parent in all respects, based on the North Carolina adoption statute involving second parent adoptions. The statute strictly prohibits this type of adoption by unmarried persons. In accordance with this prohibition, the court concluded that despite having been granted, the adoption decree giving Julia Boseman parental rights as a second parent was void. Thus, according to the court, Julia had never actually been a legally recognizable parent to the minor child under North Carolina law. A child sadly lost a parent on the day this decision was handed down. This meant far more than merely losing someone he called “Mom.” Further still, without a legal voice of his own, the child lost all of his legal rights as Julia’s son.

The North Carolina Supreme Court had the opportunity to address some major policy issues surrounding second-parent adoptions when it reached its decision in 2010, but instead it chose to adhere strictly to the plain language of the North Carolina adoption statute. This choice limited the court’s opinion to statutory construction and ignored the many current and pressing issues entangled in the prohibition of second parent adoptions in the state. Combined with the existence of a mini-DOMA governing the state’s marriage policy, the plain language of the adoption statute in North Carolina categorically precludes same-sex couples from attaining joint adoptions at all. The main goal of this paper is to accomplish what the North Carolina court successfully evaded in *Boseman v. Jarrell*, which is to analyze the public policy ramifications of prohibiting second parent adoptions. In addition to analyzing this particular case, this paper will address a number of relevant background issues.

² MARC E. ELOVITZ, *EVOLVING LEGAL ISSUES FACING THE CONTEMPORARY FAMILY* 65 (1997). (See Section III of this paper for a discussion of the definition of second parent adoption).

The first section of this paper will provide a history of what the word “family” has come to mean, and how its definition has evolved over time, including the laws governing same-sex couples. Although I remain disappointed with the *Boseman* decision and with similar laws throughout the country, there has been significant progress in our nation over the years with regard to society’s view of homosexuality. This paper will demonstrate where we began, how far we’ve come, and yet how far we still have to go in order to reach an appropriate level of equality. The second section of the paper will provide a discussion of second parent adoption, which will include an explanation of exactly what it entails, as well as which of our states recognize it, which states do not, and reasons for both policies. Once these background issues have been established, the paper will shift to an analysis of *Boseman v. Jarrell*. Although the reader is already aware of the ultimate holding, a more in depth factual and procedural history of the case prior to reaching its final judgment will be provided. Sections V and VI of this paper will address the probable consequences children will experience as a result of the *Boseman* decision as well as the troubling impact the case’s outcome has over same-sex couples who seek to adopt. Section VI will also analyze the possible platforms for an equal protection violation claim based on sexual orientation under the implementation of two different judicial standards: heightened scrutiny and rational basis review. Finally, Section VII of this paper suggests potential changes to be made by the North Carolina legislature that may help to eliminate the current problems faced by residents of the state.

I. The Evolution of Families and Relationships, Gay and Straight

The term “family” does not have any one, concrete definition. Instead, modern society’s perception of “family” is diverse and changing, and tends to depend upon who you are asking to

define it. Societal and demographic changes of the past century are vast, and thus, the family structure tends to vary greatly from household to household. Accordingly, is difficult to define an “average American family.”³ There are, however, traditional notions of what an average family should look like. “Our most powerful visions of traditional families derive from images that are still delivered to our homes in countless reruns of 1950s television sitcoms.”⁴ When the idea of family is politically debated, it is often framed by the question of how many “Ozzie and Harriet” families remain in America.⁵ While pop culture has taught us that a traditional family consists of a husband, a wife, and their many well-behaved children, very few families match this model. According to historian Stephanie Coontz, this image of the nuclear family was not portrayed in television shows such as “Ozzie & Harriet” and “Leave it to Beaver” because it was a documentary of reality.⁶ Instead, it was portrayed to represent the ideal, which was far removed from reality at the time, and acted as a goal for American families to achieve.⁷ Research from 1998 demonstrated that “only half of American children live[d] in nuclear families with both biological parents present.”⁸ Straying even further from the ideal traditional model, a similar 1999 statistic demonstrated that approximately 250,000 minor children were being raised by same-sex couples.⁹ Only five percent of this number was estimated to have been adopted.¹⁰

Turning to the legal treatment of homosexuals, the law first began by recognizing the rights that homosexuals have as individual citizens of the United States. The United States

³ Mark Glover, *Evidentiary Privileges for Cohabiting Parents: Protecting Children Inside and Outside of Marriage*, 70 LA. L. REV. 751, 799 (2010).

⁴ STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 23 (1992).

⁵ *Id.*

⁶ *Id.* at 29.

⁷ *Id.*

⁸ STEPHANIE COONTZ, *THE WAY WE REALLY ARE: COMING TO TERMS WITH AMERICA’S CHANGING FAMILIES* 79 (1997).

⁹ Lissette Gonzalez, “*With Liberty and Justice for All [Families]’*”: *The Modern American Same-Sex Family*, 23 ST. THOMAS L. REV. 293, 315 (2011).

¹⁰ *Id.*

Supreme Court has governed certain issues, and left others untouched. In *Bowers v. Hardwick*,¹¹ the Supreme Court held that a Georgia anti-sodomy statute was constitutional in a 5-4 decision. The outcome, though controversial, was later overturned. Seventeen years after *Bowers*, the Court finally revisited the issue of anti-sodomy laws when it faced a similar law in Texas. In *Lawrence v. Texas*,¹² the Court overturned its prior holding in *Bowers*, and invalidated Texas's anti-sodomy statute, which effectively invalidated similar anti-sodomy laws nationwide. The decision emphasized a constitutional right of privacy, and found that it was violated upon the state's entrance to an individual's intimate life. Though the Supreme Court has decided a number of issues affecting homosexuals as individuals, it has not yet rendered a decision in a same-sex marriage case. Some individual state courts, however, have independently invalidated anti-gay marriage laws.

While certain individual rights have been recognized through federal court decisions and legal doctrine, laws governing the legal union of same-sex couples remain in the hands of each individual state government. *Goodridge v. Dept. of Public Health*¹³ was a landmark case in which a Massachusetts appellate court finally gave same-sex couples access to the institution of marriage. The Massachusetts court acknowledged the "deep-seated religious, moral, and ethical convictions" that many people have traditionally held surrounding the idea of marriage and the importance of it being limited to one man and one woman.¹⁴ Accordingly, the court was careful to assess the state's arguments in favor of maintaining that tradition. Held to a standard of rational basis review, the state of Massachusetts claimed that its statute was rationally related to

¹¹ *Bowers v. Hardwick*, 478 U.S. 1039 (1986).

¹² *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹³ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

¹⁴ *Id.* at 948.

its legitimate state interest in protecting the primary purpose of the institution of marriage, procreation. Ultimately, the appellate court rejected the state's argument, and validated same-sex marriages in the state of Massachusetts. A few other states, though have been slow in doing so, have followed suit.

Turning to the legal statute of adoption by same-sex couples, there has been no Supreme Court case to decide upon the issue of same-sex adoption. Without the Supreme Court's precedent, the most significant judicial history of same-sex adoption litigation comes from circuit courts. *Lofton v. Secretary of the Florida Department of Children and Family Services* was decided by the Eleventh Circuit in 2004.¹⁵ The case involved a Florida law which prohibited homosexuals from adopting, and was an appeal from the District Court for the Southern District of Florida. It was decided based on a standard of rational basis review, meaning that the state was required to provide a showing that their legal classification was simply rationally related to a legitimate state interest.¹⁶ This standard is much simpler for the state to meet than a higher standard of strict scrutiny, which is applied in instances where a suspect class of individuals or a fundamental right is involved. The Eleventh Circuit chose to utilize this rational basis review because it stated that homosexuals were not a "suspect class," nor was the case at issue one involving a fundamental right. While marriage has been viewed as a fundamental right, adoption has not. Instead, it is seen as a statutory privilege. In *Lofton*, the Eleventh Circuit sided with the Florida legislature, stating that Florida's "determination that it is not in the best interests of its displaced children to be adopted by [homosexuals]" constituted a legitimate state interest.¹⁷ This outcome is problematic, because it adheres to the traditional ideal of a nuclear familial structure,

¹⁵ *Lofton v. Secretary of the Florida Department of Children and Family Services*, 377 F.3d 1275 (11th Cir. 2004).

¹⁶ *Id.* at 1277 (citing *Romer v. Evans*, 517 U.S. 620, 631 (1996)).

¹⁷ *Id.* at 1281.

and suggests that same-sex couples are ill-equipped to rear children as compared to opposite-sex couples.

Adherence to the traditional nuclear family model aligned with the assumption that it is always in a child's best interest to have two parents of different sexes puts the traditional and conventional family on a pedestal, and ignores the fact that there are many traditional nuclear families that are unsuccessful and therefore not idealistic. Maintaining traditional families as the ideal standard also ignores the plethora of successful, stable, and healthy "unconventional" families that exist so widely in American society today. A 2000 census measured that "an average of approximately twenty-two percent of male same-sex couples, and thirty-three percent of female same-sex couples were raising children."¹⁸ These families are surely unconventional, but that by no means allows for the assumption that they are any less successful than families raised by opposite sex parents. I remain hopeful that the Supreme Court will eventually take on a case confronting the issue of same-sex adoption, and allow same-sex couples the right to raise their children as part of a legally recognized family unit, though it has not taken on such a case.

II. Second Parent Adoption: What Is It, Why Doesn't North Carolina Like It, And How Do Other Jurisdictions Feel About It?

Second-parent adoption is a method of adoption that allows for a non-biological parent of a child to legally assume parental rights and responsibilities equal to those of the biological parent of that child.¹⁹ It does so without requiring the biological parent to relinquish his or her own rights as a parent upon the completion of the adoption.²⁰ This type of adoption is sought by

¹⁸ Gonzalez, *supra* note 9, at 307 (2011).

¹⁹ *Id.* at 315.

²⁰ *Id.*

individuals who are a party to a relationship already involving a child. The child in such a situation is typically either the product of one party's previous relationship, or the result of an anonymous sperm or egg donation for couples who are unable to conceive naturally.

Unfortunately for those in pursuit of parental rights via second parent adoptions, the process is not available in all states. As of the decision in *Boseman v. Jarrell* in December 2010, North Carolina has been added to the list of states which legally prohibit second parent adoptions.

The objective of North Carolina adoption law is to ensure stability and permanence for a family. Chapter 48, encompassing North Carolina's adoption statute, was created with the intent "to promote the integrity and finality of adoptions."²¹ It is also meant "to encourage prompt, conclusive disposition of adoption proceedings."²² While the law meets its objective in most aspects, it seems not to have accounted for the stability that can and often does exist in the families of unmarried couples. The court in *Boseman* held that "the law governing adoptions in North Carolina is wholly statutory,"²³ and not derived from common law. Thus, the language of the law must be taken seriously, and any best interests evaluation is limited to what is available under the law.²⁴ While N.C.G.S. §48-1-301 allows for legal adoption of a child by an individual, unmarried adult,²⁵ N.C.G.S. § 48-2-301(c) requires that for such an adoption to be granted, the relationship between the minor child and his or her biological parents must be severed.²⁶ The North Carolina court stated in its opinion that no one particular county may allow for a waiver of

²¹ N.C. GEN. STAT. §48-1-100(a) (2011).

²² *Id.*

²³ *Boseman v. Jarrell*, 704 S.E.2d 494, 498 (N.C. 2010).

²⁴ *Id.* at 502.

²⁵ *Id.* at 501 (citing N.C. GEN. STAT § 48-1-301 (2011), which allows "any adult" to adopt another individual, subject to the statute requirements.).

²⁶ *Id.* (citing N.C. GEN. STAT § 48-2-301(c) (2011), which states that "if the individual who files the petition is unmarried, no other individual may join in the petition").

either of these rules, as they are intended to be uniform throughout the state.²⁷ Rather than deciding the case with the children's interests in mind, the *Boseman* court left the potential for future interpretations the statute in the hands of the state government, declaring that "until the legislature changes the provisions of Chapter 48, we must recognize the statutory limitations on the adoption decrees that may be entered."²⁸ In doing so, the court effectively ignored §48-1-100(d) of the North Carolina General Statute, which requires liberal construction of adoption law.²⁹ The court's strict interpretation of Chapter 48 essentially rendered the best interests of minor child involved insubstantial as compared to the language of the law, and outlawed second parent adoption in North Carolina until state legislation declares otherwise.

Because second parent adoption is not a universally recognized doctrine, states have taken varied positions on the issue. Some state statutes expressly authorize this type of adoption, while in other states the law is slightly less clear. Litigation has cleared up the status of second parent adoption in some jurisdictions, though in others, the issue remains unlitigated. For those states which have litigated the issue, the outcomes have created a split among states, and the decisions vary by jurisdiction. For purposes of this paper, only examples of litigation involving same sex couples attempting to obtain second parent adoptions will be considered.

States in which courts have outlawed second parent adoption in response to claims by a homosexual individual involved in a same-sex partnership include: Wisconsin, Ohio and Nebraska. These courts have done so based on strict interpretations of their states' adoption

²⁷ *Boseman v. Jarrell*, 704 S.E.2d 494, 502 (N.C. 2010).

²⁸ *Id.*

²⁹ N.C. GEN. STAT. § 48-1-100(d) (2011) ("This Chapter [48] shall be liberally construed and applied to promote its underlying purposes and policies.").

statutes, and often at the expense of the best interests of the children involved, much like the North Carolina holding in *Boseman v. Jarrell*.

For example, in *In the Interest of Angel Lace M.*,³⁰ a woman was denied access to a legal second parent adoption of her female partner's child. In 1994, the Wisconsin Supreme Court explained that making the "best interests" standard the most prominent reason behind its decision in this case would have rendered Wisconsin adoption law essentially meaningless. The opinion seemed to prioritize the importance of established written law over the best interests of children. It stated: "The fact that an adoption ... is in the child's best interests, by itself, does not authorize a court to grant the adoption,"³¹ and if a court were to grant a petition for adoption any time it is in the child's best interests to do so, it would render several statutes "surplusage,"³² or unnecessary. Accordingly, the court declined to exercise discretion that would ensure that the best interests of the child were met, and ultimately denied the adoption petition at issue in accordance with the plain language of Wisconsin law.

The Ohio Court of Appeals decided the case of *In re adoption of Doe*³³ similarly in 1994. Although the court found the petitioner eligible to adopt the child as an individual under relevant Ohio law,³⁴ another section of the law prohibited her from doing so without severing the parental rights of her partner, the biological mother of the child.³⁵ While the court was "mindful of the dilemma facing the parties"³⁶ and was "sympathetic to their plight,"³⁷ it established that to stray

³⁰ *In the Interest of Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994).

³¹ *Id.* at 681.

³² *Id.*

³³ *In re Adoption of Doe*, 719 N.E.2d 1071 (Ohio Ct. App., Summit County 1998).

³⁴ *Id.* at 1072. (citing OHIO REV. CODE ANN. 3107.03 which allows for "an unmarried adult" to legally adopt in the state of Ohio).

³⁵ *Id.* (citing OHIO REV. CODE ANN. 3107.15(A)(1), which states that upon a decree of adoption, "except with respect to a spouse of the petitioner and relatives of the spouse," the biological or other legal parents of the adopted person are relieved of all parental rights and responsibilities).

³⁶ *Id.* at 1073.

from the plain language of the law would have been beyond its judicial power.³⁸ The court acknowledged its ability to exercise discretion favoring the best interests of the child³⁹ and knew of the couple's intentions to attain mutual legal rights as parents, but still denied the petitioner's adoption decree, extinguishing her ability to attain legal parental rights.

More recently, the Supreme Court of Nebraska handed down a decision involving second parent adoption for a same-sex couple in the 2002 case *In re Adoption of Luke. B.P. and A.E.*⁴⁰ The couple mutually raised a child who was conceived through artificial insemination via an anonymous sperm donor, akin to the facts of both the Wisconsin and Ohio cases. This meant that the birthing party was a biological parent to the child and that the other party, her partner, was not. The court denied the couple's collective petition for adoption by the non-biological parent. It did so based on its belief that adoption is purely statutory, and Nebraska adoption law, though it has been amended, requires that "all necessary consents and relinquishments have been filed" before an adoption can be granted.⁴¹ Accordingly, a biological parent's rights over a child must be relinquished prior to another individual's adoption of that child. Because the biological mother in this case intended for both herself and her partner to share parental rights, she refused to relinquish her own. Like the Wisconsin and Ohio courts, the Nebraska Supreme Court refused to grant the couple an adoption decree and did not exercise discretion in its holding. All three courts adhered strictly to the statutory language of their respective states' laws, even though this tactic left the children involved with just one legal parent.

³⁷ *Id.*

³⁸ *In re Adoption of Doe*, 719 N.E.2d 1071, 1073 (Ohio Ct. App., Summit County 1998).

³⁹ *Id.* at 1702 (citing OHIO REV. CODE ANN. 3107.14(C), providing the exercise of discretion by the trial court to give "due consideration to all known factors in determining what is in the best interest of the person to be adopted").

⁴⁰ *In re Adoption of Luke B.P. and A.E.*, 640 N.W.2d 374 (Neb. 2002).

⁴¹ *Id.* at 378.

Conversely, courts which have handed down opinions allowing for legal recognition of second parent adoptions have done so by taking an approach opposite the one used by the courts in the previous three examples. Rather than strictly adhering to plain language, courts which have recognized second parent adoptions have liberally construed state adoption statutes. Litigation in Pennsylvania, New Jersey, and Vermont permit same-sex couples to attain second parent adoptions without relinquishing the biological parent's rights. Several states in addition to these three have experienced similar judicial outcomes; however, for purposes of avoiding unnecessary length, the discussion of legally recognized second parent adoptions by same sex couples in this section of the paper will be limited to those three states.

In 1993, in *In re B.L.V.B.*,⁴² the Supreme Court of Vermont reversed a lower court decision that denied a woman, the appellant, adoptive parental rights to two children, each birthed by her partner during their six year relationship. Vermont's adoption statute allows for the "spouse" of a biological parent to adopt that parent's child without forcing the biological parent to relinquish his or her rights.⁴³ This was known as the "step parent" exception.⁴⁴ At this point, same-sex marriages were not recognized in Vermont, and the appellant and her partner were not married. Interpreting the statute strictly, the trial court denied the adoption because of the couple's legal status as unmarried. The Vermont Supreme Court, however, found that the appellant was the equivalent to what the law meant by the word "spouse." It held that "when the family unit is comprised of the natural mother and her partner, and the adoption is in the best interests of the children, terminating the natural mother's rights is unreasonable and

⁴² *In re B.L.V.B.*, 628 A.2d 1271 (Vt. 1993).

⁴³ *Id.* at 1272 (citing 15 V.S.A. § 331 (2011)).

⁴⁴ *Id.*

unnecessary.”⁴⁵ In its decision to grant the adoption, the Vermont Supreme Court used its discretion to interpret the law liberally and considered the best interests of the two children of whom adoption was sought.

Two years later in 1995, a New Jersey court reached a similar decision in *In re Adoption of Two Children by H.N.R.*⁴⁶ Like Vermont, the New Jersey court interpreted the state’s adoption statute liberally when it decided this case, which was brought by a woman seeking to adopt her partner’s twin biological children. From the time the children returned home from the hospital after birth, both the women participated equally in their upbringing.⁴⁷ It was the desire of both women to obtain joint legal parentage for the children so that they would be entitled to the health and financial benefits of both women.⁴⁸ Although New Jersey law provides that an adoption decree “absolutely terminates the parental rights of the natural parents unless, to the extent here pertinent, the plaintiff is a stepfather or stepmother of the adopted child,”⁴⁹ the court held that this “stepparent exception” should not be read restrictively to prohibit unmarried partners from attaining adoptive rights. Instead, the court relied on a section of New Jersey law which required liberal construction of the state’s adoption statutes. This section appeared similar to sections of Vermont, New Jersey, and North Carolina laws, although the liberal interpretation mandated was ignored by the *Boseman* court. The New Jersey court declared that the law should be “read in context and construed in light of both the liberal-construction mandate and the best-interests test,” and that in doing so, a denial of the petition for adoption is inappropriate.⁵⁰ Like

⁴⁵ *Id.* at 1273.

⁴⁶ *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. 1995).

⁴⁷ *Id.* at 536.

⁴⁸ *Id.* at 537.

⁴⁹ *Id.* (citing N.J. STAT. § 9:3-50(c)(1)).

⁵⁰ *Id.* at 538.

the Vermont court, the New Jersey court relied strongly on the best interests of the children involved.

In re Adoption of R.B.F.,⁵¹ which was decided by the Pennsylvania Supreme Court in 2002, differs from the Vermont and New Jersey cases in that it involves two males, rather than two females, in a same-sex partnership. This factual difference is significant because society's confidence in child caretakers most traditionally lies with females rather than males. Regardless of this traditional conception, the court reached a decision that gave both men the opportunity to obtain legal parental rights through second parent adoption, in spite of the law which appeared to exclude them from joint parentage. While the trial court in this case denied the petition for adoption, the Pennsylvania Supreme Court remanded the case back down to the lower court for review. It did so with an order for evidentiary hearings, to provide the two men with the opportunity to show good cause for the adoption, and demonstrate that the children's best interests would be served. The two children involved in this case were each individually adopted by one partner during the course of the couple's relationship, and subsequently, the second partner sought to assert legal parental rights by adopting both children. The court relied on a section of Pennsylvania law that allowed a showing of cause by a petitioner that demonstrates why he or she could not meet the statutory requirements. Upon such a showing, the trial court may exercise discretion to determine the status of the adoption petition, even if it does not meet the requisite statutory elements.⁵²

Although there remains a jurisdictional split in the way different states approach second parent adoptions, many state statutes contain a liberal interpretation mandate written into their adoption law. It is my hope that more courts will follow the example of states such as Vermont

⁵¹ *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002).

⁵² *Id.* at 1202.

or New Jersey, and continue to interpret adoption statutes liberally to include the varied family forms that exist in our modern society.

III. *Boseman v. Jarrell*: From Start to Final Judgment

We've already addressed the ultimate holding of the North Carolina Supreme Court in *Boseman v. Jarrell*. It seems logical, however, to gain some knowledge of the case from beginning to end, or perhaps even prior to when it became a case.

The seven year romantic relationship between Julia Boseman and Melissa Jarrell started out no differently than any ordinary intimate relationship between two people. Julia and Melissa were introduced in 1998, struck up a conversation, and hit it off immediately. At the time, Julia lived in Wilmington, North Carolina and Melissa was living in Rhode Island.⁵³ Subsequently after they met, the two women increasingly began to spend more time together. They discussed their commonalities and learned that they both had an expressed, passionate interest in having children. They began to date seriously about one month later.⁵⁴ In the spring of 1999, the couple moved in together in Julia's hometown of Wilmington.⁵⁵ After more than a year of exclusive dating and cohabitation, they more seriously discussed their mutual desires to have children together as a couple. Being two women, and obviously unable to birth children together naturally, they explored another route to joint parenthood which would allow both parties to participate in processes of conception and motherhood.⁵⁶

Together they decided that Melissa would become pregnant via an anonymous sperm donor, and Julia would support Melissa and their unborn child physically, emotionally, and

⁵³ *Boseman v. Jarrell*, 704 S.E.2d 494, 496 (N.C. 2010).

⁵⁴ *Id.* at 496-7.

⁵⁵ *Id.* at 497.

⁵⁶ *Id.*

fiscally, throughout the pregnancy.⁵⁷ Prior to the birth of the child, Julia would read to and play music for the child inside womb.⁵⁸ Julia cared for Melissa during both the pregnancy and the birth of the child by being present at the delivery.⁵⁹ The baby was delivered on October of 2002 approximately four years after the couple initially met.⁶⁰ The parties named the child together, giving him a hyphenated surname consisting of both of their surnames.⁶¹ Further demonstrating Julia’s parental involvement, the couple baptized the child at Julia’s church.⁶² At the baptism ceremony, the couple presented themselves as the child’s two parents to friends and family, and each woman’s respective families accepted and integrated the child into their families.⁶³ Julia and Melissa further demonstrated their collaborative parentage over the child within the home.

The two women shared “equal roles” in the parenting process.⁶⁴ If either party was away from the home for any amount of time, the other party would care for the child by accepting full parental responsibilities.⁶⁵ The minor child viewed both women as parents, evidenced by his referring to Julia and Melissa as “Mom” and “Mommy” respectively.⁶⁶ In 2004, the two women conversed and agreed that it was important for the non-birthing partner to solidify her parental rights and adopt the child, thereby becoming the second legal parent.⁶⁷ Under North Carolina statutes, second-parent adoptions were not administered, but in 2005, Julia learned that in

⁵⁷ *Id.*

⁵⁸ *Boseman v. Jarrell*, 704 S.E.2d 494, 497 (N.C. 2010).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Boseman v. Jarrell*, 704 S.E.2d 494, 497 (N.C. 2010).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

Durham County, North Carolina, adoptions were being granted to individuals without severing the rights of the biological parent.⁶⁸

In June of 2005, the couple approached a judge in the District Court of Durham County, and petitioned for adoption.⁶⁹ The petition was contingent upon the requirement that the natural, biological mother's parental rights not be severed upon adoption by her partner. In order to grant the adoption, the judge would need to avoid compliance with two specific statutory provisions that would ordinarily require severance of biological parental rights, N.C.G.S. § 48-3-606(9) and N.C.G.S. § 48-1-106(c).⁷⁰ In August of 2005, the district court judge approved the petition and entered an adoption decree, giving Julia legal parental rights. The decree stated that it established the parent-child relationship between Julia and the child being adopted, while simultaneously maintaining the parent-child relationship existing between the child being adopted and the biological mother.⁷¹

In May of 2006, the couple ended their romantic relationship, although Julia continued to provide financial support for both Melissa and the child.⁷² Melissa, presumably bitter after a difficult breakup of a long-term relationship, proceeded to limit Julia's time with the child, prompting Julia to file a complaint seeking joint custody of her child in the District Court of New Hanover County.⁷³ This filing takes us to the beginning of the legal procedural history of the case. In response to the complaint, Melissa utilized the adoption decree, to which she previously consented, as her defense, claiming that it was "void *ab initio*,"⁷⁴ and that Julia was not entitled

⁶⁸ Boseman v. Jarrell, 704 S.E.2d 494, 497 (N.C. 2010).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 498.

⁷³ Boseman v. Jarrell, 704 S.E.2d 494, 498 (N.C. 2010).

⁷⁴ *Id.* at 501. The term "void *ab initio*" means "legal nullity."

to custody.⁷⁵ There were two issues in the initial case, both of which remained at issue for the Supreme Court. The first issue is the one on which this paper focuses, which is the validity of the adoption decree, which determines the parental status of Julia. While Melissa claimed it was invalid, the trial court did not reach the merits of this issue, citing lack of jurisdiction.⁷⁶ On the issue of custody, although not the focus of this paper, the trial court ultimately awarded custody to the parties jointly.⁷⁷ Melissa, unsatisfied with the latter half of the opinion, appealed the trial court's decision.⁷⁸

In 2009, the Court of Appeals heard and decided this case. This court, unlike the trial court, concluded that the adoption decree was valid.⁷⁹ The court felt that the decree comported with the “intent and purposes” of North Carolina laws surrounding adoption.⁸⁰ The Court of Appeals rejected Melissa's defense, holding that her appeal was inappropriate because it was made beyond the statutory time limits for a defendant to challenge an adoption decree. Accordingly, the Court of Appeals found the adoption decree valid under North Carolina law.⁸¹ With regard to the second issue surrounding custody, the Court of Appeals awarded joint custody to both parties, keeping the trial court's holding intact. Melissa, still unsatisfied, once again petitioned for review of the court's decision.⁸²

⁷⁵ *Id.* at 498.

⁷⁶ *Id.* The court claimed that it did not have jurisdiction to declare void a judge's order from another district.

⁷⁷ *Id.*

⁷⁸ *Boseman v. Jarrell*, 704 S.E.2d 494, 498 (2010).

⁷⁹ *Id.*

⁸⁰ *Boseman v. Jarrell*, 681 S.E.2d 374 (N.C. Court App. 2009) at 381.

⁸¹ *Id.* at 381-382. N.C. GEN. STAT. § 48-2-607(a) states: “After the final order of adoption is entered, no party to an adoption proceeding nor anyone claiming under such a party may question the validity of the adoption because of any defect or irregularity, jurisdictional or otherwise, in the proceeding, but shall be fully bound by the order.” Section (c) of the same statute states: “A parent or guardian whose consent was necessary under this Chapter but was not obtained may, within six months of the time the omission is or ought reasonably to have been discovered, move to have the decree of adoption set aside.”

⁸² *Boseman v. Jarrell*, 704 S.E.2d 494, 498 (N.C. 2010).

In 2010, the Supreme Court of North Carolina reviewed the case.⁸³ Melissa argued that the adoption court lacked subject matter jurisdiction to grant the adoption decree, and that the decree was void because it did not comply with North Carolina adoption provisions. Julia responded that the adoption court exercised proper subject matter jurisdiction, and further referenced that Chapter 48 of North Carolina adoption law was intended to be construed liberally, to promote its underlying policies and purposes. Accordingly, Julia urged the Supreme Court to use the intended liberal interpretation of the statute and keep the decision of the Court of Appeals intact.⁸⁴ The court held that a direct placement adoption, like the one at issue, “effects a complete substitution of families.”⁸⁵ The court also noted that in order for an adoption decree to be granted, adoption must be sought under Chapter 48.⁸⁶ The Supreme Court held that because the adoption was conditioned upon non-compliance with two specific provisions under the law, the adoption was not available under Chapter 48, and therefore void.⁸⁷ Though it left the lower court’s joint custody determination intact, the North Carolina Supreme Court rejected Julia’s request for a liberal interpretation of the statute and denied her parental rights.

IV. Children Have Rights: Policy Issues Surrounding the Interests of Children Dictate a Different Outcome

North Carolina and other similar states may believe their laws are adequately serving the public’s needs, but legislators and interpreters of the law seem to have ignored several important

⁸³ *Id.*

⁸⁴ *Id.* (citing N.C. GEN. STAT. § 48-1-100(d) (2009)).

⁸⁵ *Id.* at 499. (citing N.C. GEN. STAT. § 48-1-106(a) (2009). “Substitution of families” in the context of a direct placement adoption means that once the adoption is complete, the adoptive parents replace the biological parents as the child’s family. This substitution severs the prior familial relationship the biological family once had with the child, and transfers all such relationship rights to the new, adoptive family.

⁸⁶ *Id.*

⁸⁷ *Boseman v. Jarrell*, 704 S.E.2d 494, 501 (N.C. 2010).

issues with regard to adoption and familial structuring as they pertain to children. First, it is important to note that young children do not have a legal voice of their own, and for this reason, it is vital for them to be represented in the legal world. Children are arguably “the least powerful group of persons in any society and the least well represented in any political system.”⁸⁸

Detrimental results can and do occur when children are underrepresented, or when certain rights are not provided to them or to their families. For purposes of this paper, this section is focused specifically on parental rights which govern the lives of children. Children of married parents enjoy certain benefits, which can include “payments from a parent’s pension; contributions from a governmental program such as Social Security; or royalties under a federal statute such as the Copyright Act.”⁸⁹ “Children of a deceased parent also may recover for the wrongful death of their parent under some state’s wrongful death statutes.”⁹⁰ The non-recognition of legal parentage to two individuals in a same-sex relationship can lead to a number of problems for children, including non-access to any of the aforementioned benefits.

An example of one such problem can be seen in *Nancy S. v. Michele G.*⁹¹ The troubling outcome in this case demonstrates that a child will likely face harm in the event of the death of their only legally recognized parent when the law fails to recognize that there are two individuals who hold themselves out as the child’s parents. In this particular case, the child involved was the son of two women in a lesbian relationship. One of the women was the boy’s biological mother, and the other was her long-term partner, though the two women ultimately ended their relationship with each other. This long-term partner, however, acted as the child’s parent for a

⁸⁸ JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN 14 (2006).

⁸⁹ Debra Carrasquillo Hedges, *The Forgotten Children: Same Sex Partners, Their Children and Unequal Treatment*, 41 B.C. L. REV. 883, 887 (2000) (citing ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY AND STATE, PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW 241 (3d ed. 1995)).

⁹⁰ *Id.* (citing *Levy v. Louisiana*, 391 U.S. 68, 69, 72 (1968)).

⁹¹ *Gonzalez supra* note 13, at 310-11 (Describing the facts of *Nancy S. v. Michele G.*, 228 Cal. App. 3d, 831 (Cal. App. 1st Dist. 1991)).

number of years, and shared parental responsibilities with the child’s biological mother, but was never a legally recognized parent in accordance with the law. The boy’s biological mother was involved in a tragic car accident which sadly took her life. His mother’s former partner, the boy’s “other mother,” as he called her, arrived to claim him from the hospital, but was denied the ability to do so because she was not a “legally recognized parent.”⁹² Rather than placing the boy in the care and the arms of a woman who had previously taken parental responsibility for him and portrayed herself to him and to others as his mother for many years, the boy was placed into unfamiliar foster care. This decision was made without regard to what was in the boy’s best interest.⁹³ This example is not the first, and probably not the last of its kind. It exemplifies one of the major problems with non-recognition of second parent adoptions.

Improper placement of a child is just one of the troubling effects of an outcome like the one in *Boseman*, barring second parent adoptions. There are many other rules governing familial relationships in several states that are structured to protect the interests of biological parents.⁹⁴ The state can cause “detriments to children when it makes decisions about their relational lives,”⁹⁵ and it does so when its decisions are “based at least in part on supposed rights and/or interests of people other than the children immediately involved.”⁹⁶ In accordance with Chapter 48, North Carolina adoption law claims to be rooted in the interests of the minor adoptee. Chapter 48 states that “the needs, interests, and rights of minor adoptees are primary,” and that “any conflict between the interests of a minor adoptee and those of an adult shall be resolved in

⁹² *Id.* at 311.

⁹³ *Id.*

⁹⁴ DWYER, *supra* note 88, at 2.

⁹⁵ *Id.* at 3.

⁹⁶ *Id.*

favor of the minor.”⁹⁷ If this is actually the case, and the minor child’s interests are the statute’s primary concerns, why wasn’t the *Boseman* outcome a different one? In *Boseman*, Melissa Jarrell’s rights were protected as the child’s biological mother at the expense of both the interests of child, and of the woman with whom the child’s biological mother shared all parental responsibilities, Julia Boseman. If North Carolina put its alleged statutory purpose as stated very clearly by §48-1-100(c) into practice, the North Carolina Supreme Court should have protected the rights of the child rather than the rights of the child’s biological mother, and provided him with the two legally recognized parents he was entitled to rather than merely one.

Marriage, as discussed earlier, carries with it an abundance of rights for children. The problems faced by children of same-sex couples would be abolished if a federal law were passed that declared all state laws preventing same-sex couples from participating in the institution of marriage unconstitutional. “Where a married couple has children, their children are also directly or indirectly, but no less auspiciously, the recipients of the special legal and economic protections obtained by civil marriage.”⁹⁸ “Marital children reap a measure of family stability and economic security based on their parents' legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children.”⁹⁹ In accordance with these findings, without the opportunity for their parents to marry, children of unmarried same-sex couples can be deprived of the rights and protections that similar children who are the product of a marriage are automatically entitled to. This fact was made clear in *Boseman* and gives rise to an issue outside of a discussion of adoption, and moves in the direction of a possible Equal

⁹⁷ N.C. GEN. STAT. § 48-11-100(C) (2011).

⁹⁸ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 956 (Mass. 2003).

⁹⁹ *Id.*

Protection Clause claim with regard to same-sex marriage and its current state of recognition, or more accurately, non-recognition in a majority of states.

V. Same-Sex Couples Have Rights, Too: Is There a Viable Equal Protection Clause Claim to Be Made?

When a state constructs its adoption statute to prohibit unmarried couples from adopting jointly, it is usually understood to have done so in order to encourage only the most stable of couples to adopt. The claim generally is that this construction is done to ensure stability in a family for a child based on the belief that married couples exemplify permanence and finality better than unmarried couples. However, without legal recognition of marriage for same sex couples, most states do not afford same-sex couples the same opportunity afforded to heterosexual couples to demonstrate such stability. Same-sex couples may not adopt jointly in most states, as a result of the statutory restrictions which force them to remain unmarried. North Carolina marital law is a mini-DOMA which, like the federal Defense of Marriage Act, limits who may participate in the institution of marriage by sexual orientation. As a result of its mini-DOMA, marriages that are legally recognized in North Carolina are only those between spouses of opposite sexes. Creating this barrier for gay couples who wish to be married is even further problematic because it simultaneously constructs a second barrier, one that prevents such a couple from jointly adopting in North Carolina. Differing rights of heterosexual and same-sex couples differ with regard to marriage demonstrate that a law is unequal. This inequality gives rise to a constitutional claim for same-sex couples to assert that their rights are continuously being violated under the Equal Protection Clause of the Fourteenth Amendment.

Marriage is generally a state governed practice. The laws of marriage are not universal, but rather, each state has its own legislation surrounding this important institution. However, it is recognized in the landmark case, *Loving v. Virginia*, that “while [a] state court [would] no doubt [be] correct in asserting that marriage is a social relation subject to the State's police power,”¹⁰⁰ such a state is not entitled to govern this institution unregulated, and is subject to the boundaries of the United States Constitution. The Supreme Court also recognized the importance of marriage, when it declared that marrying “is one of the “basic civil rights of man,” fundamental to our very existence and survival.”¹⁰¹ It is easy, however, to question the fundamentality of marriage when it can be denied to certain people. In challenging the constitutionality of a state statute, it is favorable for the state to be subject to a high standard of proof. Ideally, a plaintiff would be able to subject a state to “strict scrutiny,” which is the highest standard for a state to meet. To utilize strict scrutiny, the issue for review must be based upon a “suspect classification.” Historically, race has been an appropriate candidate for strict scrutiny; Gender, and sexual orientation, on the other hand, have not. Because of the highly specific elements of strict scrutiny,¹⁰² it is unlikely for same-sex marriage bans to be subject to this level of judicial review.

The next highest standard of judicial review after strict scrutiny is “intermediate scrutiny,” also known as “heightened scrutiny.” Though it is a lower standard of review than is strict scrutiny, heightened scrutiny remains very difficult for a state to meet. In order to achieve heightened scrutiny, a state must demonstrate that the law being challenged “furthers a legitimate

¹⁰⁰ *Loving v. Virginia*, 388 U.S. 1, 7 (1967). The case involved a Virginia statute with prohibited interracial couples from marrying. The court ultimately held that the statute was unconstitutional because it violated the Fourteenth Amendment, which required Equal Protection of the law, by preventing access to the fundamental right of marriage based upon race.

¹⁰¹ *Id.* at 12 (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

¹⁰² Strict scrutiny, as it is unlikely to apply in claims of sex discrimination, is unnecessary to review for purposes of this paper. The elements of strict scrutiny are unrelated to the focus of this paper, and thus, are not explained.

governmental interest,” and does so by means that are “substantially related” to that interest. Heightened scrutiny is the most common standard used in Equal Protection litigation, and is applied in cases involving gender or sex discrimination.¹⁰³ Due to a strong parallel between sex discrimination and sexual orientation discrimination, academics argue that there is potential for a same-sex marriage ban claim to succeed against a state under a standard of heightened scrutiny.¹⁰⁴ Although this standard has not historically been applied in the context of sexual orientation, it is entirely attainable.

Andrew Koppelman, a professor of law and political science, makes a sound argument relating sexual orientation discrimination to discrimination on the basis of gender. Essentially, Koppelman’s argument is that if Ozzie is fired from his job, or is prosecuted for sexual activities he engages in with Harry, while he would not be subject to these actions if he had done the exact same things with Harriet, then Ozzie is experience discrimination based on his sex.¹⁰⁵ Analogizing this argument to North Carolina’s marriage law is not too far-fetched. Consider a man seeking to marry another man and is denied the right. Instead, that same man seeks to join the same institution of marriage, but this time with a woman accompanying him. If he is allowed to do so under these circumstances, the law is discriminating against the man on the basis of his sexual orientation, and on the basis of his sex as compared to the sex of the partner whom he wishes to marry.

Even if sexual orientation cannot serve as a basis for a heightened application of judicial review, the same-sex marriage ban should still fail under rational basis review. This method of

¹⁰³ EVAN GERSTMANN, SAME-SEX MARRIAGE AND THE CONSTITUTION 48 (2008).

¹⁰⁴ *Id.* at 49.

¹⁰⁵ *Id.*

judicial review is available to any type of classification, of any group.¹⁰⁶ For example, several courts have used rational basis review to find unconstitutional the military's old policy of excluding openly gay homosexual and bisexuals.¹⁰⁷ As previously discussed in a previous section of this paper, rational basis review requires a state to demonstrate that the challenged law serves a legitimate governmental interest, and that it does so in a way that it rationally related to that interest. Note the different between this standard and intermediate scrutiny, as the two are similarly worded. To get passed intermediate scrutiny, the means by which the law achieves a legitimate governmental interest must be "substantially related" to that interest, while under rational basis review, the means must only be "rationally related." In the military context, a D.C. circuit court reasoned that excluding homosexuals in order to achieve a state's alleged interest in preventing the spread of HIV was unconstitutional because the means of achieving that goal and the goal itself were not rationally related.¹⁰⁸ It would be irrational to presume that because an individual classifies himself as a homosexual that it must follow that such an individual will transmit HIV or invade the privacy of other men.

To analogize same-sex marriage bans to the above military example, consider the following. If a state claims that its goal is to encourage procreation, then that state's alleged attempt to achieve its goal by limiting the institution of marriage to opposite-sex couples should be rendered unconstitutional. Marriage is not a means of procreation, and furthermore, married couples are not required under any laws to procreate. Accordingly, precluding homosexuals from marrying does not further encourage or give greater incentive for married, opposite-sex couples

¹⁰⁶ ROBERT WINTEMUTE, *SEXUAL ORIENTATION AND HUMAN RIGHTS: THE UNITED STATES CONSTITUTION, THE EUROPEAN CONVENTION, AND THE CANADIAN CHARTER* 78 (1995).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 79 (citing *Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993)).

to procreate. Presumably, the rate of procreation would remain the same, regardless of whether or not same-sex couples were permitted to marry.

Additionally, if a state claims that its goal is to promote familial security for children, and suggests that opposite-sex couples are more likely to form stable and permanent families than same-sex couples, then its position should once again be rendered unconstitutional. Upon re-examination of the statistics from Section II of this paper, it should be clear that prohibiting same-sex marriage is not rationally related to the goal of promoting familial stability. We already know that a substantial number of same-sex couples are currently raising children into their families. This can occur either as a result of the ability of homosexuals to adopt as individuals, or if a homosexual individual was once part of an opposite sex relationship which produced children. Rather than promoting familial security and stability for children, outlawing marriage for same-sex couples has the opposite effect. Marriage, as many traditionalists argue, does increase the likelihood of success for a relationship. Studies confirm that marital relationships typically last much longer than relationships between unmarried cohabitants, with¹⁰⁹ Accordingly, if same-sex couples are permitted to marry, the security and stability of the families they are currently, and will continue to raise will be greater.

Earlier this year, Attorney General Eric Holder made his views known to Congress that the Section 3 of the federal Defense of Marriage Act (“DOMA”) violates the United States Constitution.¹¹⁰ He concludes that “classifications based on sexual orientation warrant heightened scrutiny”¹¹¹ because such classifications violate the equal protection component of the Fifth Amendment. Under heightened scrutiny, the state must describe actual purposes, rather

¹⁰⁹ GLOVER, *supra* note 3, at 773 (citing Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J.L. & FAM. STUD. 1, 2 (2007)).

¹¹⁰ WILLIAM N. ESKRIDGE, JR. ET. AL., *SEXUALITY, GENDER AND THE LAW* 1151 (Foundation Press, 3rd ed. 2011).

¹¹¹ *Id.*

than rationalized or hypothetical purposes, for a law in question. Mr. Holder demonstrates the President's agreement with the application of heightened scrutiny to sexual orientation classifications. The President believes so strongly in the statute's unconstitutionality that he has instructed the Department of Justice in two pending circuit court cases not to defend DOMA.¹¹² In accordance with the new standard of review, all pending DOMA litigation will be subject to heightened scrutiny, and the courts in which such cases are being heard will all be informed of the change.¹¹³ This letter severely strengthens the position of same-sex couples seeking to marry in states in which it is prohibited. If the federal DOMA is found unconstitutional under its new standard of review, states with mini-DOMAs will be unable to continue to enforce them. If this is to happen, it will have a tremendous effect on future litigation, and more importantly, on the status of same-sex couples throughout the country.

VI. Resolution: Can the North Carolina Take Action to Eliminate the Troubling and Potentially Unconstitutional Effects of *Boseman v. Jarrell*?

It is clear that there are a number of policy concerns that have been established regarding a second-parent adoption prohibition, from the perspectives of both children and same-sex couples. In consequence, I feel obliged to offer suggestions for remedial action that may correct the troubling and potentially unconstitutional effects of North Carolina laws. There are at least two reasonable options to be considered in my opinion, both of which require legislative action. The first potential remedy involves amending marriage statutes governing the state. The second remedy involves amending adoptions statutes and putting a greater emphasis on the intent for

¹¹² *Id.*

¹¹³ *Id.*

them to be liberally construed, as stated in Chapter 48.¹¹⁴ Additionally, language should be added to adoption statutes to provide for a “de facto” or “psychological” parent who may, upon sufficient showing, assert their parental rights over a child without forming a prerequisite marital relationship with the child’s biological parent.

The first suggested remedial action would require the North Carolina legislature to revise its marriage statutes. In its revision, the state would do away with its mini-DOMA which currently requires marriages in the state to be between one man and one woman, and consequently allow same-sex couples to legally marry within the state. If there had been a legislative act mimicking this one prior to Julia Boseman filing her claim, it is likely that the case would never have materialized. Julia and Melissa could have and should have had the option to marry prior to their decision to approach the court about adoption, and a valid adoption decree could have been granted to them in accordance with North Carolina law.

The second remedial action would require an amendment of the North Carolina adoption statute. The amendment should alter the language surrounding second parent adoptions, and should give the right to not only a spouse, but a cohabiting partner of a child’s biological parent to successfully obtain legal parentage while leaving the biological parent’s rights intact. Currently, the statute treats same-sex and opposite-sex couples differently based on their access to a piece of paper certifying their union. “Two people who filled the same roles in their respective homes should not be treated differently based on whether they had a marriage license.”¹¹⁵ Individuals under the state’s law are permitted to adopt notwithstanding their sexual

¹¹⁴ N.C. GEN. STAT. 48-1-100(d) (2011) (“This Chapter shall be liberally construed and applied to promote its underlying purposes and policies.”).

¹¹⁵ NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE* 177 (2008).

orientation, and so, the next logical step is to allow joint parentage and second parent adoption by same-sex couples as units.

VII. Conclusion

Throughout the course of this paper, we have been introduced to the concept of second parent adoption and acknowledged some of the reasons why states are for, or against the doctrine. In Section III, this jurisdictional split was acknowledged by considering examples of litigation in states which have either allowed, or outlawed second parent adoptions by same-sex couples. In Section IV, the facts and final judgment of *Boseman v. Jarrell* were closely analyzed, along with the numerous policy arguments that accompany the case's outcome. Section V demonstrated the detrimental effects children can and do experience as a result of prohibiting couples, namely same-sex couples, from attaining second parent adoptions. Section VI introduced an Equal Protection Clause claim to be made by same-sex couples against a state like North Carolina, which prohibits them from marrying. The same section hypothesized the outcome of such a claim under different standards of judicial review, and determined that even if a state was subjected to the lowest standard of review, a claim against that state's same-sex marriage ban has a high potential for success. In accordance with North Carolina statutes and case law provided by the *Boseman* decision, the inability of same-sex couples to attain married status in the state categorically prohibits them from obtaining second parent adoptions.

The final section of this paper provides suggestions of amending or abandoning the current laws in North Carolina which prohibit same-sex couples from marrying or jointly adopting as couples. Although the future of the law in North Carolina remains unclear, in accordance with the letter written by Attorney General Holder, it seems likely that at some point

in the future that heightened scrutiny will be applied to same-sex marriage bans. Such activity would have a tremendously positive effect on the rights of homosexuals, as well as their children. Such a standard would likely outlaw the federal DOMA, which would undoubtedly result in the overturning of many states' laws surrounding same-sex marriage. If states were required to lift their bans on same-sex marriages, second parent adoptions would consequently become available to same-sex couples under the laws of several states, including North Carolina. This outcome would be ideal in that it would benefit both individual homosexuals, bringing them closer to equality, and children, who would have access to the benefits of having two legal parents, regardless of their sexes or sexual orientations. It is my sincere hope that this outcome occurs sooner rather than later, for the sake of all families who are negatively affected by the current state of their local laws.